

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

FRIEDRICH & DIMMOCK, INC.¹

Employer

and

ORVILLE PAUL ZIENNKER

Petitioner

Case 4–UD–395

and

GLASS MOLDERS, POTTERY, PLASTICS &
ALLIED WORKERS INTERNATIONAL UNION,
AFL–CIO, CLC, and its LOCAL UNION 219²

Union Involved

**REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

The Employer, Friedrich & Dimmock, Inc., manufactures industrial and scientific glassware products, fiberoptic connectors, and specialty tubing at its Millville, New Jersey plant. The Union Involved, Glass & Pottery Workers International Union and its Local 219, represents the Employer’s production, maintenance, and shipping employees at the plant.³ The Petitioner, Orville Paul Ziennker, filed a petition with the National Labor Relations Board under Section 9(e) of the National Labor Relations Act seeking to rescind the authority of the Union Involved to require employees, under its collective bargaining agreement with the Employer, to make union security payments to the Union Involved in order to retain their jobs.

The issue in this case is the eligibility of 10 employees who participated in a brief economic strike in May 2003 and who have not been reinstated to unit positions. The Employer contends that seven of the employees who were not reinstated are ineligible to vote because they

¹ The Employer’s name appears as amended at the hearing.

² The Petitioner’s name appears as amended at the hearing.

³ The parties’ relationship dates back at least ten years. It is not known whether the Union was initially certified by election or voluntarily recognized.

were no longer needed. Of these seven strikers, one was permanently replaced by a new hire and the remaining six, along with the replaced striker, were issued permanent layoff notices because they were no longer needed. The Employer further contends that the three other unreinstated employees are ineligible to vote because their job classification — Quality Inspector — has been excluded from the bargaining unit. The Union Involved contends that the replaced striker is eligible to vote in any election held within 12 months of the commencement of the strike, and that the remaining nine strikers, including Quality Control Inspectors, are eligible to vote in the election because they have not obtained permanent employment elsewhere and the Employer has not sufficiently established the elimination of their jobs.

A hearing officer of the Board held a hearing, and the parties filed briefs with me.⁴ I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the replaced economic striker is eligible to vote in any election held within 12 months of the commencement of the strike. I have further concluded that there are issues remaining as to the eligibility of the six unreplaced economic strikers and the three Quality Inspectors and that these employees shall vote subject to the challenged ballot procedure. Accordingly, I have directed an election in the production and maintenance unit at issue.

I. FACTS

The Union Involved has represented the Employer's production, maintenance, and shipping employees for more than 10 years. When the parties' prior collective bargaining agreement expired on May 7, 2003, the Union Involved commenced an economic strike. Of the Employer's 21 bargaining unit employees employed at the time, 10 participated in the strike, including the Employer's three Quality Inspectors.⁵ Eleven bargaining unit employees chose not to honor the strike and remained at work. During the course of the strike, the Employer replaced one of the strikers — a driver/shipper⁶ — with a new hire.⁷

On May 16, 2003, the Employer and the Union Involved reached agreement on a new, three-year collective bargaining agreement. The new collective bargaining agreement contained a union-security provision that required employees to make union-security payments to the Union Involved as a condition of employment.⁸ During the negotiations that led to the new agreement, the parties agreed that Quality Inspectors would be excluded from the bargaining unit and that the Quality Inspector position would become a managerial position.

⁴ Action on this case was blocked until resolution of Case 4-CA-32225.

⁵ The Quality Inspectors were Fran Alcorn, Lois Jenkins, and Lori Swing. The other employees who were on strike were Bob Ferus, Bonnie Haddock, James Hamidy, Jill Sanderlin, Tracy Tomlinson, Patty Tyler, and Judy Weaver.

⁶ James Hamidy.

⁷ Brian Brown.

⁸ The union-security provision is set forth in Article 1, Section 2 of the agreement. It states:

It is agreed that all employees to whom this Contract is applicable shall, as a continuing condition of employment, become and remain members of the Union on the thirtieth (30th) day following the beginning of such employment to the effective date of this Contract whichever is latter [sic], all to be enforced and applied in accordance with the provisions of Section 8(a)(3) of the Labor-Management Relations Act of 1947, as amended.

Also on May 16, 2003, the Employer and Union Involved reached a strike settlement agreement.⁹ Under that agreement, the incumbent Quality Inspectors were to be given the qualifications for the new managerial position and 10 days in which to agree to take the new jobs. If they chose not to, they would be given “priority” to unit positions once the “current complement of unit employees . . . returned to work.” At the time of the hearing, one of the three Quality Inspectors¹⁰ had decided not to accept the new managerial position and to accept instead “priority” to a unit position. Although the original 10-day period had passed, the Employer’s Controller, Glenna Matkowsky, testified at the hearing that the other two Quality Inspectors had not yet decided whether they would accept the new managerial position but were expected to do so the following Monday, June 23, 2003.¹¹ The strike settlement also called for recall of the strikers “by seniority and the ability to perform the work available” and required the Employer to give the Union Involved an estimate, on May 20, 2003, when the strikers would be recalled. In the interim, the Employer issued the strikers temporary layoff notices so that they could collect unemployment.

As of the date of the hearing, June 20, 2003, none of the 10 former strikers had been recalled. On May 19, 2003, the Employer notified the Union Involved that the strikers, except the replaced driver/shipper, would be recalled in two to six weeks. The Employer’s Vice President & General Manager, Kurt Henry, testified that the dates were “pure guesses.” On June 5, 2003, two days after the UD petition was filed, the Employer notified the seven former strikers who were not Quality Inspectors¹² that they were permanently laid off due to “the continued lack of available work.” According to Controller Matkowsky and Vice President Henry, the Employer decided that it could meet existing production needs with the 12 unit employees it then employed.

The Employer’s Layoff & Production History. Under Articles 3 and 6 of the collective bargaining agreement, the Employer has the right to lay employees off. Under Article 9, Section 5, employees on layoff have recall rights for up to 18 months following their layoff. Between 1999 and 2000, the Employer increased its employee complement from about 30 employees to about 160 due to the technology boom and strong demand for its fiberoptic connectors. In 2001, the Employer laid off the bulk of the employees, issuing generally the same permanent layoff notices it gave to the strikers in 2003. In January and February 2002, when total overtime hours for the unit ranged from 4.5 to 54.75, the Employer recalled five employees but laid them off in May 2002. Between May 2002 and May 2003, the bargaining unit stabilized at about 22 employees, until the strike, when the number of employees in the unit decreased from 21 to 11 employees, and then 12 when the Employer hired the replacement for the driver/shipper. At the time of the hearing in June 2003, unit employees were working a combined total of 25 to 35 hours per week of overtime. Vice President Henry testified that the Employer secures new business orders every week, sometimes every day. He further testified that every employee

⁹ The parties entitled this agreement “Statement” and appended it to their collective bargaining agreement.

¹⁰ Fran Alcorn.

¹¹ The Employer, in its brief, reported that Quality Inspector Lois Jenkins had accepted a managerial position. The Employer did not report what the third Quality Inspector, Lori Swing, had decided to do.

¹² Bob Ferus, Bonnie Haddock, James Hamidy, Jill Sanderlin, Tracy Tomlinson, Patty Tyler, and Judy Weaver.

would have to work an average of 10 hours of overtime per week, for a total of 120 hours per week, for a month before he would consider recalling any employees.

II. FACTORS DETERMINING ELIGIBILITY

Replaced Economic Striker

Section 2(3) of the Act provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he or she has not obtained regular and substantially equivalent employment. A permanently replaced economic striker is entitled to reinstatement rights. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Section 9(c)(3) provides that replaced economic strikers remain eligible to vote for 12 months following the commencement of a strike. *Sanderson Farms*, 271 NLRB 1477 (1984); *Pioneer Flour Mills*, 174 NLRB 1202, 1203 (1969). The effect of Section 9(c)(3) was to eliminate the former voting disability of economic strikers and, at the same time, to preserve the concurrent eligibility of permanent replacements for such strikers. *Wilton Wood, Inc.*, 127 NLRB 1675 (1960). However, replaced strikers are not eligible to vote in an election held more than 12 months after the commencement of an economic strike, unless they have been reinstated by the voting eligibility date. *Wahl Clipper Corp.*, 195 NLRB 634 (1972). Hence, the Board may expedite the processing of a petition in order to conduct the election within the 12 months. *Kingsport Press*, 146 NLRB 1111 (1964).

Unreplaced Economic Strikers

As for the strikers who have not been replaced, Section 9(c)(3) places no restriction on their voting eligibility similar to that imposed upon replaced strikers. *Gulf States Paper Corp.*, 219 NLRB 806 (1975). Unreplaced economic strikers lose their employee status if, prior to the election, they secure permanent employment elsewhere, the employer demonstrates that it eliminated their jobs for economic reasons, or the employer discharges or refuses to reinstate the employees for misconduct rendering them unsuitable for reemployment. *Virginia Concrete Co.*, 316 NLRB 261, 264 (1995), enfd. 75 F.3d 974 (4th Cir. 1996); *Lamb-Grays Harbor Co.*, 295 NLRB 355, 357 (1989); *Gulf States Paper*, supra, 219 NLRB at 806. When an employer eliminates the positions of economic strikers for economic reasons, those strikers' voting eligibility is determined by examining the underlying cause for the elimination of their positions to ensure that the economic justifications warranting forfeiture of their employment status are not predicated wholly on considerations flowing from the strike itself. *Erman Corp.*, 330 NLRB 95 (1999); *Lamb-Grays Harbor*, supra, 295 NLRB at 357; *Kable Printing Co.*, 238 NLRB 1092 (1978). Before disenfranchising a former striker, the employer has the burden of showing the elimination of a striker's position and it is not enough to show a temporary depressed economic condition. *Erman Corp.*, supra, 330 NLRB at 95; *Gulf States Paper Corp.*, supra, 219 NLRB at 806–807; *Globe Molded Plastics*, 200 NLRB 377 (1972).

When there is an issue as to the eligibility of strikers, the Board's long-standing preference is to resolve these issues on the basis of a post election proceeding. *Mariah Inc.*, 322

NLRB 586 (1996); *Safeway Trails*, 224 NLRB 1342, 1343 (1976); *Universal Mfg. Co.*, 197 NLRB 618 (1972).

III. ANALYSIS

As to the eligibility of the replaced striker, **James Hamidy**, if this employee has not been reinstated or recalled at the time of the election, he would be eligible to vote provided the election takes place within 12 months of the commencement of the strike. Accordingly, I find that **James Hamidy** is an eligible voter if the election takes place prior to May 7, 2004.

As to the unreplaced employees other than the Quality Control Inspectors, **Bob Ferus, Bonnie Haddock, Jill Sanderlin, Tracy Tomlinson, Patty Tyler, and Judy Weaver**, the Employer contends that they have no reasonable expectation of recall, yet the Employer's Vice President testified that the Employer secures new business orders at least weekly and the employees continue to enjoy recall rights under the parties' collective bargaining agreement until November 2004. As to the Quality Inspectors, **Fran Alcorn, Lois Jenkins, and Lori Swing**, their jobs were excluded from the bargaining unit. However, under the strike settlement agreement, these employees had a right to reject the new managerial position and accept "priority" recall, albeit after the recall of the other seven employees. One of the Quality Inspectors, **Fran Alcorn**, had rejected the managerial position and opted instead for recall rights. As of the time of the hearing, the other two Quality Inspectors had not yet decided what they wanted to do.¹³

In sum, I find I find that there are issues remaining as to the eligibility of the remaining nine strikers. Accordingly, **Fran Alcorn, Bob Ferus, Bonnie Haddock, Lois Jenkins, Jill Sanderlin, Lori Swing, Tracy Tomlinson, Patty Tyler, and Judy Weaver** shall vote subject to challenge.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union Involved is a labor organization within the meaning of the Act.

¹³ Although the Employer, in its brief, reported that **Lois Jenkins** had accepted a managerial position, this is not a matter of record.

4. The Petitioner seeks an election to rescind the authority of the Union Involved to require, under its collective bargaining agreement with the Employer, that employees make certain union-security payments to the Union Involved in order to retain their jobs.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(e)(1) of the Act:

All full-time and regular part-time production, maintenance, and shipping employees¹⁴ employed at the Employer's 2127 Wheaton Avenue, Millville, New Jersey facility, excluding Quality Control Inspectors, office and clerical employees, plant guards, professional engineers and chemists, superintendents, foremen, and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to rescind the authority of **Glass Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, and its Local 219** to require under its agreement with the Employer that employees make certain lawful payments to the Union Involved in order to retain their jobs. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike that commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

¹⁴ The following former strikers may vote subject to challenge: **Fran Alcorn, Bob Ferus, Bonnie Haddock, Lois Jenkins, Jill Sanderlin, Lori Swing, Tracy Tomlinson, Patty Tyler, and Judy Weaver**. Replaced striker **James Hamidy** is eligible to vote if the election is held prior to May 7, 2004.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106-4499 on or before **April 16, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658, or by E-mail to Region4@NLRB.gov.¹⁵ Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

D. RIGHT TO REQUEST REVIEW

¹⁵ Documents sent by E-mail should be in a "read only" format that ensures that the attachment may not be modified or altered. The NLRB utilizes Microsoft Office software. Accordingly, an attachment to an E-mail message sent to a Regional, Subregional or Resident Office must be in an electronic format that may be opened, read and printed by that office. Microsoft Word documents must bear the suffix ".doc."; other documents must be named in a fashion to permit their recognition by Microsoft Office software, e.g., ".ppt" (PowerPoint or ".xls" (Excel). The responsibility for the receipt and usability of a document rests exclusively upon the sender.

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be filed electronically. For details on how to file a request for review electronically, see <http://gpea.NLRB.gov/>. This request must be received by the Board in Washington by 5:00 p.m., EST on **April 23, 2004**.

Signed: April 9, 2004

at Philadelphia, PA

/s/ (Dorothy L. Moore-Duncan)

DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four

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